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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

In the Matter of )  
 )  
Policy and Rules Concerning ) CC Docket No. 96-61  
the Interstate, Interexchange )  
Marketplace )  
 )  
Implementation of Section )  
254(g) of the Communications )  
Act of 1934, as amended )

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To: The Commission

**COMMENTS OF COMMNET CELLULAR INC.**

CommNet Cellular Inc. ("CommNet")<sup>1</sup> submits the following comments in response to the *Further Notice of Proposed Rulemaking* in the above-referenced proceeding.<sup>2</sup> It is CommNet's basic position that Section 254(g)'s rate integration provisions do not apply to commercial mobile radio service ("CMRS") providers. Nevertheless, in the event the Court of Appeals upholds the Commission's contrary interpretation of Section 254(g), CommNet

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<sup>1</sup> CommNet and the affiliates it controls serve cellular service areas in Colorado, Idaho, Iowa, Montana, North Dakota, South Dakota, New Mexico, Utah, and Wyoming.

<sup>2</sup> *Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Further Notice of Proposed Rulemaking*, CC Docket No. 96-61, FCC 99-43 (rel. Apr. 21, 1999) ("FNPRM").

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submits that the Commission must forbear from enforcing Section 254(g) against CMRS carriers.

Application of rate integration to CMRS rates would greatly disserve the public interest and forbearance is warranted based upon the current record evidence in this proceeding. At minimum, however, CommNet believes that the Commission should forbear from requiring rate integration for wide-area calling plans, across CMRS affiliates, or for roaming charges.

**I. Rate Integration Provisions of Section 254(g) Do Not Apply to CMRS Providers and, in Any Event, the Commission Must Forbear from Enforcing Rate Integration on CMRS**

CommNet submits that 254(g) does not apply to CMRS carriers. As a number of parties have noted in this proceeding, Congress expressly stated in the 1996 Act's legislative history that Section 254(g) was intended to codify then-existing policies for rate averaging and rate integration.<sup>3</sup> The Commission's rate integration policies, however, had never previously been applied to CMRS carriers. Thus, it is clear that Section 254(g) was not intended to apply to CMRS carriers.

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<sup>3</sup> See H.R. Conf. Rep. No. 104-458 at 132 (1996); S. Rep. No. 104-23 at 30 (1995) (Section 254(g) "simply incorporates in the 1934 Act the existing practice of geographic rate averaging and rate integration . . . . This provision is not intended to alter existing geographic rate averaging policies as enforced by the FCC on the date of enactment . . . .").

The Commission side-stepped this clear statement of Congressional intent, by arguing that "[b]ecause the language of the statute is unambiguous and plainly applies to CMRS providers, we need not examine the legislative history of section 254(g)."<sup>4</sup> As Commissioner Powell noted, however, this "'plain language' analysis" is unpersuasive.<sup>5</sup> Indeed, the Commission itself previously found "the phrase 'a provider of interstate interexchange telecommunications services' in Section 254(g)" to be "ambiguous" and, therefore, resort to legislative history to help determine Congressional intent is wholly appropriate.<sup>6</sup> In CommNet's view, there is no support for the Commission's conclusion that Section 254(g) applies to CMRS carriers.

Even assuming *arguendo*, however, that Section 254(g) applies to CMRS providers, the competitiveness of the CMRS industry demonstrates that forbearance from enforcing Section 254(g)

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<sup>4</sup> *Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of Section 254(g) of the Communication Act of 1934, as amended, Memorandum Opinion and Order*, CC Docket No. 96-61, FCC 98-347, ¶ 11 (released Dec. 31, 1998), recon. pending, appeal pending, *CTIA v. FCC*, No. 99-1045 (D.C. Cir. 1999).

<sup>5</sup> See Dissenting Statement of Commissioner Michael K. Powell, CC Docket No. 96-61, released January 29, 1999, at 1-2.

<sup>6</sup> *Policy and Rules Concerning the Interstate Interexchange Marketplace*, CC Docket No. 96-61, *First Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd. 11812, ¶ 14 (1997). ("Reconsideration Order").

against CMRS carriers is mandated by Section 10.<sup>7</sup> Rate integration is unnecessary to ensure that CMRS providers' charges, practices, classifications, or regulations, are just and reasonable. In fact, given the industry's competitive pricing, rapid deployment of new services, high churn rate, and other factors, it is clear that market forces are adequate to ensure that rates remain just, reasonable and nondiscriminatory.

Moreover, if a CMRS carrier charges unreasonably discriminatory rates for interstate, interexchange service, such practices are subject to Sections 201, 202 and 208.<sup>8</sup> For these reasons also, rate integration is not necessary to protect consumers.

Finally, forbearance is consistent with the public interest. Forbearance will promote competition by giving CMRS providers flexibility to meet customer demands with innovative services and pricing. CommNet and its affiliates provide service in over 75

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<sup>7</sup> See 47 U.S.C. § 160. To confirm, CommNet's arguments regarding forbearance are offered in the alternative and are not a concession that Section 254(g) applies to CMRS providers in the first instance.

<sup>8</sup> See 47 U.S.C. §§ 201, 202 and 208; *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, 16872 ¶ 31 (1998); *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd. 1411, 1478-79 ¶¶ 175-76 (1994).

cellular service area markets in 14 states, and must compete with a number of different carriers in those markets. Under rate integration, CommNet would be prohibited from developing innovative pricing plans to respond to the specific demands of each particular market – and might also be prohibited from defining local market areas in ways that meet its business objectives and customer requirements. In short, CommNet would be required to act in lockstep in each market, undermining its competitive position and denying customers the full range of choices they expect and deserve.

Consequently, for the reasons stated herein and in the record already compiled in this proceeding, CommNet submits that forbearance from enforcing Section 254(g) against CMRS carriers is required under Section 10.

**II. At A Minimum, Forbearance is Required for Wide-Area Calling Plans, Across CMRS Affiliates, and for CMRS Roaming Charges**

While CommNet believes that no rate integration requirements should be imposed on CMRS carriers generally, CommNet submits that, at a minimum, there are three areas in which forbearance for CMRS carriers is essential to serve the public interest –

wide area calling plans, affiliation, and roaming.<sup>9</sup> CommNet briefly discusses these issues below.

#### **A. Wide Area Calling Plans**

In the *FNPRM*, the Commission seeks comment on "alternative ways of implementing rate integration in the wide-area calling plan context."<sup>10</sup> CommNet submits that there is no basis for imposing rate integration on wide-area calling plans.<sup>11</sup>

Wide-area CMRS calling plans permit subscribers to make calls throughout a broad geographic area for the same price as a local call, without regard to geographic or license boundaries. These type of plans are extraordinarily popular and in significant demand by consumers. Indeed, the Commission has acknowledged that "application of rate integration to wide area rate plans could be disruptive to consumers,"<sup>12</sup> and that such plans "appear to offer customers significant benefits in the form of a

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<sup>9</sup> Providing of course that the Commission is successful in defending its interpretation of Section 254(g) as applying to CMRS rates before the United States Court of Appeals.

<sup>10</sup> *FNPRM* ¶ 15.

<sup>11</sup> In this regard, the parties advocating application of rate integration to CMRS providers have indicated that such plans should not be subject to rate integration. See Alaska Opposition at 15; Hawaii Opposition at 19.

<sup>12</sup> *Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of Section 254(g) of the Communication Act of 1934, as amended, Order*, 12 FCC Rcd. 15739, 15747 (1997).

simplified rate structure and additional choice."<sup>13</sup> The Commission simply should not eliminate the fundamental public benefits of these types of innovative pricing plans.

Moreover, forbearing from enforcing rate integration on wide-area plans would make it unnecessary to engage in the problematic exercise of attempting to define the terms "exchange" and "toll service" for CMRS purposes.<sup>14</sup> Such an endeavor may have significant unintended consequences in other regulatory circumstances in which the concepts of "exchanges" and "toll service" play a role. Accordingly, the Commission should proceed, if at all, only with extraordinary caution before adopting new definitions of these concepts. In light of the above, CommNet submits that forbearance from requiring rate integration for wide-area calling plans is warranted.

#### **B. Rate Integration Across Affiliates**

The Commission should not require rate integration across affiliates for CMRS carriers.<sup>15</sup> CMRS carriers' ownership structures, including CommNet's, evolved for a number of reasonable business reasons, none of which include evasion of rate integration rules. Again, CommNet competes in its markets against a

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<sup>13</sup> FNPRM ¶ 11.

<sup>14</sup> See FNPRM ¶¶ 11-14.

<sup>15</sup> FNPRM ¶ 18.

number of different carriers, and each carrier has its own rate structure. Imposing rate integration across affiliates will minimize CommNet's pricing flexibility and force carriers to move away from low-cost wide area calling plans – again, to the detriment of consumers. Fiduciary issues in numerous partnerships in which CommNet is involved, as well as potential anticompetitive consequences, would also be implicated by requiring integration across affiliates. Many wireless carriers would face similar negative impacts.

### **C. Roaming**

The Commission seeks comment on whether to impose rate integration on roaming charges associated with interstate, interexchange calls.<sup>16</sup> Roaming is a commercial, contractual relationship between carriers whereby one carrier pays the other for the right to have its subscribers use the other's network. Roaming charges are not cost-based, but rather reflect numerous business considerations. Consequently, imposing rate integration on roaming would be a nightmare to implement.

Further, carriers such as CommNet, which serve extensive rural areas, compete vigorously with other carriers by providing a greater roaming footprint and more competitive roaming rates. Imposing rate integration on roaming charges would thus undermine

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<sup>16</sup> FNPRM ¶ 28.



CommNet's particular competitive position as well as CMRS competition in general. Such a result would clearly disserve the public interest.

**Conclusion**

For the foregoing reasons, CommNet agrees with those parties who have argued that Section 254(g)'s rate integration provisions do not apply to CMRS providers. Should the Commission and courts finally determine otherwise, CommNet submits that the Commission must nevertheless forbear from enforcing Section 254(g) for CMRS carriers. Lastly, at a minimum, rate integration should not be imposed on wide-area calling plans, across CMRS affiliates, or to roaming charges.

Respectfully submitted,

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